

## §21.51

(1)(i) If the attorney, agent, or expert witness is in private practice, his or her customary fee for similar services; or

(ii) If the attorney, agent, or expert witness is an employee of the applicant, the fully allocated cost of the services.

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services.

(3) The time the attorney, agent, or expert witness actually spent on the applicant's behalf with respect to the adversary adjudication.

(4) The time the attorney, agent, or expert witness reasonably spent in light of the difficulty or complexity of the covered issues in the adversary adjudication.

(5) Any other factors that may bear on the value of the services provided by the attorney, agent, or expert witness.

(b) The adjudicative officer may not grant—

(1) An award for the fee of an attorney or agent in excess of \$75.00 per hour; or

(2) An award to compensate an expert witness in excess of the highest rate at which the Department pays expert witnesses.

(c) The adjudicative officer may also determine whether—

(1) Any study, analysis, engineering report, text, or project for which the applicant seeks an award was necessary for the preparation of the applicant's case in the adversary adjudication; and

(2) The costs claimed by the applicant for this item or items are reasonable.

(d) The adjudicative officer may not make an award to an eligible party if the adjudicative officer, the CRRA, or the Secretary on review finds that, based on a review of the administrative record as a whole—

(1) The position of the Department, as defined in §21.3, was substantially justified; or

(2) Special circumstances make an award unjust.

(e) The adjudicative officer may reduce or deny an award to the extent that the applicant engaged in conduct

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that unduly or unreasonably protracted the adversary adjudication.

(f) If an applicant is entitled to an award because the applicant prevailed over another agency of the United States that participated in a proceeding before the Department and that agency's position was not substantially justified, the adjudicative officer shall determine whether to make the award, or an appropriate portion of the award, against that agency. For the purpose of this determination, the requirements of this subpart apply.

(Authority: 5 U.S.C. 504(a), (b)(1)(A), and (b)(1)(E))

### §21.51 Initial decision in applications not subject to the CRRA.

(a) In applications not subject to the jurisdiction of the CRRA, the adjudicative officer shall issue an initial decision on an application within 30 days after completion of proceedings on the application.

(b) The initial decision must include the following:

(1) Written findings, including sufficient supporting explanation, on—

(i) The applicant's status as a prevailing party;

(ii) The applicant's eligibility;

(iii) Whether the position of the Department was substantially justified;

(iv) Whether special circumstances make an award unjust;

(v) If applicable, whether the applicant engaged in conduct that unduly or unreasonably protracted the adversary adjudication; and

(vi) Other factual issues raised in the adversary adjudication.

(2) A statement of the amount awarded, including an explanation—with supporting information—for any difference between the amount requested by the applicant and the amount awarded.

(3) A statement of the applicant's right to request review by the Secretary under §21.54.

(4) A statement of the applicant's right under §21.56 to seek judicial review of the final award determination.

(c) The explanation referred to in paragraph (b)(2) of this section may include—

(1) Whether the amount requested was reasonable; and

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(2) The extent to which the applicant unduly or unreasonably protracted the adversary adjudication.

(Authority: 5 U.S.C. 504 (a)(3) and (c))

### § 21.52 Initial decision by an adjudicative officer in applications subject to CRRA jurisdiction.

(a) If the application is subject to the jurisdiction of the CRRA, the adjudicative officer shall issue the initial decision within 30 days after completion of the proceedings.

(b) The initial decision must include the information required under § 21.51(b). However, instead of the information required under § 21.51(b)(3), the initial decision must inform the applicant of—

(1) Its right to request review by the CRRA; and

(2) Its right to request review by the Secretary of the CRRA's final decision.

(c) If the applicant or the Department's counsel appeals the adjudicative officer's initial decision, the appeal must be submitted to the CRRA, in writing, within 30 days after the initial decision is issued.

(d) If the applicant or the Department's counsel does not appeal the adjudicative officer's initial decision to the CRRA and the Secretary does not decide to review the initial decision under § 21.54(a), the initial decision becomes the Department's final decision 60 days after it is issued by the officer.

(Authority: 5 U.S.C. 504(b)(1)(C); 20 U.S.C. 1681; 29 U.S.C. 794; 42 U.S.C. 2000d-1 *et seq.* and 6101 *et seq.*)

### § 21.53 Final decision of the CRRA.

(a) In an application subject to the jurisdiction of the CRRA, the CRRA shall, within 30 days after receipt of the written appeal—

(1) Issue a final decision on the appeal of the adjudicative officer's initial decision; or

(2) Remand the application to the adjudicative officer for further proceedings.

(b) The CRRA shall review the initial decision on the basis of the written record of the proceedings on the application. This includes but is not limited to—

(1) The written request; and

(2) The adjudicative officer's findings as described in § 21.51(b).

(c) The CRRA shall act on the review by either—

(1) Issuing a final decision on the application; or

(2) Remanding the application to the adjudicative officer for further proceedings.

(d) If the CRRA issues a final decision, the CRRA's decision must include—

(1) Written findings, including supporting explanation, on—

(i) The applicant's status as a prevailing party;

(ii) The applicant's eligibility;

(iii) Whether the position of the Department was substantially justified;

(iv) Whether special circumstances make an award unjust;

(v) Whether the applicant engaged in conduct that unduly or unreasonably protracted the adversary adjudication; and

(vi) Other factual issues raised in the adversary adjudication.

(2) A statement of the amount awarded, including an explanation—with supporting information—for any difference between the amount requested by the applicant and the amount awarded.

(3) A statement of the applicant's right to request review by the Secretary under § 21.54.

(4) A statement of the applicant's right under § 21.56 to seek judicial review of the final award determination.

(e) The explanation referred to in paragraph (d)(2) of this section may include—

(1) Whether the amount requested was reasonable; and

(2) The extent to which the applicant unduly or unreasonably protracted the adversary adjudication.

(Authority: 5 U.S.C. 301, 557 (b) and (c); 20 U.S.C. 1681 and 3401 *et seq.*; 29 U.S.C. 794; 42 U.S.C. 2000d-1 *et seq.* and 6101 *et seq.*)

### § 21.54 Review by the Secretary.

(a) The Secretary may decide to review—

(1) An initial decision made by an adjudicative officer in a proceeding not subject to CRRA review;